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December 6, 2002

**VIA ELECTRONIC COMMENT FILING SYSTEM**

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Room TW-A325
Washington, D.C. 20554

Re: *Digital Broadcast Copy Protection*
MB Docket No. 02-230

Dear Ms. Dortch:

Enclosed for inclusion in the above-referenced docket are the joint comments of the Internet Commerce Coalition and the United States Internet Service Provider Association, in response to the Commission's Notice of Proposed Rulemaking, FCC 02-231 (released Aug. 9, 2002).

Sincerely,

James J. Halpert
Paul W. Jamieson
*Counsel for the Internet Commerce Coalition*

PWJ/eo
Enclosure

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| Digital Broadcast Copy Protection | ) | MB Docket No. 02-230 |
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# COMMENTS OF THE INTERNET COMMERCE COALITION AND U.S. INTERNET SERVICE PROVIDER ASSOCIATION

## I. Introduction and Summary

The Internet Commerce Coalition ("ICC") and the U.S. Internet Service Provider Association ("U.S. ISPA") appreciate the opportunity to submit these comments regarding the Commission's Digital Broadcast Copy Protection proceeding. We commend the Commission on its thoughtful NPRM,[1] and its goals of speeding the transition to DTV and freeing broadcast spectrum for alternative uses.

The ICC is a coalition of leading Internet Service Providers ("ISPs"), e-commerce companies, and trade associations in the United States. Its members include AT&T, AOL Time Warner, BellSouth, CompTel, eBay, the Information Technology Association of America ("ITAA"), SBC Communications Inc. ("SBC"), Teleglobe, the U.S. Telecommunications Association ("USTA"), and Verizon Communications Inc. The ICC works to promote policies that allow service providers, their customers, and other users to do business on the global

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[1] *In the Matter of Digital Broadcast Copy Protection, Notice of Proposed Rulemaking,* MB Docket No. 02-230, FCC 02-231 (released Aug. 9, 2002) (the "NPRM").

Internet under reasonable rules governing liability and use of technology, and are concerned with maintaining and upgrading the reliability, security and robustness of Internet infrastructure.

U.S. ISPA is a national trade association whose members are among the largest providers of Internet service in this country. Among the members of U.S. ISPA are Earthlink, Cable & Wireless, WorldCom, eBay, AOL Time Warner, Verizon Online, Teleglobe, and SBC. A principal purpose of U.S. ISPA is to represent its members before Federal agencies, courts, and Congress in matters of common concern.

The ICC and U.S. ISPA file these comments primarily to urge the Commission to make explicit in any eventual rules it adopts in this proceeding that any technical requirements that it imposes on "consumer electronics devices" (NPRM, at ¶ 6) are confined to receivers, demodulators, and related CPE, and that they do not apply to the software, equipment and services of Internet service providers.

In addition, we ask the Commission to ensure that the process by which new technologies will be approved among industry participants and by the Commission (as proposed in the BPDG Final Report) protects innovation, is no more regulatory than necessary, and eliminates the risk of anti-competitive conduct in connection with application or revision of the broadcast flag standard.

### A. Broadcast Flag Requirements Should Not Apply in Any Way to Internet Networks

The Commission's rulemaking, if any, should specifically state that it does not apply to the networks of Internet service providers.

The NPRM correctly focuses on technical requirements that might apply "in the limited sphere of digital broadcast television" to DTV receivers, demodulators, and related CPE of end

users who receive broadcast signals. NPRM at ¶ 3. The NPRM does not suggest that requirements apply to the equipment, software and services of Internet service providers, but seeks comment "whether and how downstream devices would be required to protect content." Id. ¶ 6.

It is important that the Commission clarify this aspect of its eventual rulemaking, given the desire of copyright owners to obtain technology mandates beyond CPE and related consumer electronics devices and into the network itself.[2] Although this proceeding is important to address a specific unauthorized distribution problem, which can be addressed through limited regulation, it should not and need not become a springboard for broad government regulation of the Internet. Brief clarification by the Commission on this point is important to avoid significant potential confusion.

**1. The Commission Has Repeatedly Declined to Regulate the Internet**

In contrast to its long line of decisions regulating broadcasters, the Commission has declined to regulate Internet service providers (ISPs). During this period, the Internet has become an indispensable medium, with as many as 165 million Internet users in the U.S. alone[3] who use the medium for both commerce and human communication.

With regard to the Internet specifically, the 1996 Act declared expressly that one of its goals was to "preserve the vibrant and competitive free market that presently exists for the

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2 *See* S. 2048, 107th Cong., 2d Sess., § 4 (legislation endorsed by MPAA that would impose strict liability against interactive computer service networks that do not recognize and transmit with integrity directions of copyright owners that conform to government-mandated copy protection standards approved by the Commission); *see generally*, Comments of the National Music Publishers' Association at 9-10 (expressing concern about transmission on the Internet).

3 *See* http://www.nua.ie/surveys/how_many_online/n_america.html (citing estimate of NielsenNetRatings).

Internet and other interactive computer services, *unfettered by Federal or State regulation.*"[4] Following passage of the 1996 Act, the Commission has declined repeatedly to regulate Internet service providers.[5] This deregulatory climate has contributed to the tremendous growth in dial-up Internet access use in the U.S.

A decision to regulate ISP networks in the context of digital broadcast copy protection would undercut the regulatory environment that has allowed the Internet to flourish, and would be contrary both to the 1996 Act and to this extensive body of prior FCC decisions.

Moreover, in contrast to the broadcast industry, Internet service providers (other than ISPs in the nascent Wi-Fi industry) do not make use of free public spectrum. The unauthorized redistribution issue thus has no implications for freeing public spectrum, making the basis for FCC-imposed technical mandates tenuous at best.

### 2. Congress Has Established a Separate Statutory Framework for Development of Copy Protection Standards on Internet Networks

The NPRM notes that the "broadcast flag" may fairly be said to represent "a consensus" standard for digital broadcast copy protection among the members of the Broadcast Protection Discussion Subgroup ("BPDG"), NPRM ¶ 2. This is not true with regard to the operators of Internet networks, who were not involved in these negotiations.

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[4] 47 U.S.C. § 230(b)(2) (emphasis added).

[5] *See, e.g., Federal-State Joint Board on Universal Service, Report to Congress,* 13 FCC Rcd 11501, ¶ 73 (1998) (declining to impose USF contribution requirements on ISPs); *Access Charge Reform,* 12 FCC Rcd 15982, ¶¶ 344-47 (1997) (declining to impose access charge requirements on ISPs).

In fact, in title II of the Digital Millennium Copyright Act, P.L. 105-190, codified at 17 U.S.C. § 512, Congress established a different, consensus framework for negotiation of copy protection standards among copyright owners and service providers.

Section 512(i) provides that service providers must accommodate and not interfere with "standard technical measures," which it defines as "technical measures used by copyright owners to identify or protect copyrighted works [that]—

> (A) have been developed pursuant to broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;
>
> (B) are available to any person on reasonable and nondiscriminatory terms; and
>
> (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks."

This framework is plainly one of open, private sector consensus negotiations, not government mandates. In light of this specific statutory framework, it would be inappropriate for regulators to impose mandates on ISPs.

What is more, service providers have an important stake in the success of these negotiations, and are interested pursing them, with the goal of enhancing the opportunities of consumers to obtain lawfully-distributed, high-quality, affordable content on-demand content over broadband connections. Copyright owners have been engaged in negotiations with other parties. There is plainly not even a failure of private sector negotiations of the sort that might provide a premise for government intervention.

### 3. The Digital Copy Protection Problem Should Be Solved Before Content Reaches the Internet Networks

Finally, as the Commission appears to contemplate in its NPRM, copy protection implemented in receivers, demodulators, and related consumer electronics devices should make

the imposition of technical mandates upon Internet networks unnecessary. This is because the devices themselves should respond to the broadcast flag in order to prevent unauthorized distribution of properly coded digital broadcast content. This issue is not explicitly addressed in the BPDG Final Report, but avoiding imposing mandates on Internet networks is consistent with the Report's focus on placing copy protection features in consumer electronics devices.

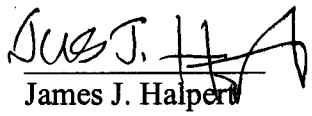
For all these reasons, the Commission should clarify that Internet networks are not be considered "downstream products" (as described Section 6.3 of the Final Report) that must comply with robustness and compliance requirements.

## III. Any System for Preventing Unauthorized Redistribution of Should Permit Copying in the Home Network Environment and Prevent Anti-Competitive Conduct.

As leading network operators, ICC and U.S. ISPA members have a significant stake in the success of home networks. Although we have no objection to the broadcast flag applying to home networking devices, we urge the Commission to clarify, as contemplated by the BPDG Final Report, that copying and redistribution of digital broadcast signals within a home network environment are permitted.

Secondly, the Commission should ensure that the process by which new technologies will be approved among industry participants and by the Commission (as proposed in the BPDG Final Report) is implemented in a way that protects innovation and eliminates any question of anti-competitive conduct. For example, approval of new technologies should be conducted in a way that follows principles of transparency, due process, and application of objective criteria. Businesses that were not part of the BPDG process, but that develop innovative consumer electronics or other consumer devices that meet the requirements adopted in this proceeding, should have a convenient, cost-effective way of ensuring approval of their innovations.

Respectfully submitted,



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